Supreme Court of the United States

OCTOBER TERM—1945

No. .....

EASTERN TRANSPORTATION COMPANY,
Petitioner,

against

RITNER K. WALLING and MARTUG TOWING COMPANY,
Respondents.

BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

I

Opinions of the Courts below.

The District Court rendered a decision (R. 71a), 57 F. Supp. 539, and findings of fact and conclusions of law (R. 82a) on which in the case of Ritner K. Walling against the tug "Montrose" and the tug "Caspian" it rendered a decree in favor of libellant, Ritner K. Walling, against the tug "Montrose," awarding such libellant full recovery of its damages, and in the proceeding entitled in the matter of the petition of Martug Towing Company, owner of the "Caspian," for limitation of liability, a decree exonerating the Martug Towing Company and the "Caspian" from all responsibility.

The Circuit Court of Appeals affirmed the decrees of the District Court, with an opinion filed December 28, 1945, 152 F. (2nd) 924.

II

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, U. S. Code, Title 28, Section 347. The decree (order for mandate) sought to be reviewed was entered on December 28, 1945.

III

Statement of the case.

A summary statement of the case is contained in the petition and is here omitted in the interest of brevity.

IV

Specification of errors.

The Circuit Court of Appeals erred in the following respects:

1. In failing to find that the lights displayed by the "Mamei" were not in conformity with Section 312.16 of the regulations promulgated by the Board of Supervising Inspectors (appendix, p. 6), pursuant to Provision 33 U. S. C. A. Sec. 157, and in failing to find that the owner of the "Mamei" did not prove such violation could not have contributed to the collision.

2. In failing to find that the tug "Caspian," which was in charge of the "Mamei" tow, shared responsibility with the "Mamei" for the proper arrangement of lights on the "Mamei."

3. In failing to find that the failure of the "Mamei" and the "Caspian" to display lights required by the regulations contributed to the collision.

4. In failing to find that the absence of a lookout on the "Mamei" flotilla, for which the tug "Caspian" was responsible, contributed to the collision.

5. In failing to find that the "Caspian" was obliged to prove that the absence of a properly stationed lookout could not have contributed to the collision.

ARGUMENT

POINT I

The majority of the Circuit Court of Appeals erred in its interpretation of the regulation for lights to be displayed by the "Mamei."

The only ground stated by the majority of the Court for its holding that the "Mamei" was not obliged to display a green light on her starboard side because her superstructure obstructed the green light of the "Caspian," and a red light on her port side because her superstructure obstructed the red light of the "Hudson," is that the rule by its terms relates to "barges or canal boats towing alongside a steam vessel," whereas the "Mamei" was being towed by two, not a single steam vessel. As already pointed out, the third member of the Court, Judge Biggs, differed and stated squarely that in his opinion the rule applies when the superstructure of the barge obstructs the

light of any towing vessel alongside, whether there be one or more than one towing vessels.

The majority of the Court was of the opinion that when there is a tug on either side of a towed barge and the outer side light of either of these tugs is not effected by any obstruction on the barge but which obstruction interferes with the view of the inner side lights of the respective tugs that therefore in such a situation there is no need for light on the barge. The fallacy of this assertion is well demonstrated in the present case. There was a bend in the canal near the place of collision so that the "Montrose" was approaching a definite point on the starboard bow of the "Mamei" flotilla and thus the green starboard light on the right side of the "Hudson," the tug on the right side of the "Mamei," and the green starboard light of the "Caspian," the tug on the left side of the "Mamei," should have been in view. The green starboard side light of the "Caspian" was shut out from view of the "Montrose" by reason of the obstruction on the "Mamei's" deck.

Neither red port lights of the respective tugs were visible to the "Montrose" as they complied with Article 2 of the Navigation Rules (33 U. S. C. A. 172) requiring side lights of vessels to be arranged to show through an arc of the compass from right ahead to two points abaft of beam but screened so as to prevent these lights from being seen across the respective bows.

The "Montrose" navigator saw the white lights which are required by regulation to be displayed; (cf. Articles 2 and 3, 33 U. S. C. A. 172, 173). Seeing no colored light close to them, he thought the white lights were displayed by a vessel proceeding in the same direction as it is in only such a situation that one colored light of a vessel, if properly arranged, cannot be seen.

The "Mamei" being 52 feet wide, the white lights of the "Caspian" were so far from the "Hudson's" green

light which the "Montrose" saw that they appeared to be on a vessel moving separately and not a part of the "Hudson-Mamei" flotilla. The majority of the Circuit Court recognized that this confused White, the navigator of the "Montrose," and in all probability brought about the collision, saying in its opinion:

> "It may very well have been these errors in estimating the situation which led Captain White to the ultimate collision."

Despite its own statement that the collision "may very well have been" brought about by deceptive and confusing lights, the majority of the Court approved such arrangement as being in compliance with the rule.

The majority of the Circuit Court said:

> "It may very well be that exhibition by "Mamei" of both her running lights in this situation would merely serve to confuse a vessel approaching from an opposite direction."

It did not indicate how the navigator of the "Montrose" would have been confused if the "Mamei" had been displaying proper running lights. On the contrary, we submit that the navigator of the "Montrose" or of any other vessel similarly situated, having full knowledge of all regulations, could not assume anything other than that a vessel showing one or more colored lights was an approaching vessel.

The Courts have long recognized that the rules for the display of lights on vessels are of the utmost importance.

Eugene F. Moran, 212 U. S. 466;
The Titan, 23 Fed. 413;
The Conoho, 24 Fed. 758;
The Oliver, 22 Fed. 848;
Seaboard Shipping Corp. v. *Globe Oil Delivery Corp.*, 93 F. (2d) 463.

It is well settled that a vessel whose lights, at the time of collision, are not properly set must meet the burden of proving that the violation not only did not, but could not, have contributed to the collision.

Seaboard Shipping Corp. v. *Globe Oil Delivery Corp.*, 93 F. (2d) 463.

As already pointed out, the majority of the Court recognized that the arrangement of the lights on the "Mamei" flotilla may very well have led the "Montrose" navigator to the ultimate collision. This, we submit, plainly constitutes a holding that the arrangement of the "Mamei's" lights was a contributing cause of the collision. If the majority of the Court had construed the rule to require colored lights on the "Mamei," as did Judge Biggs in his concurring opinion, then, we submit, the Court obviously would have concluded that the violation of the regulation was a contributing cause of the collision.

POINT II

The tug in charge of the tow, and the barge in tow, are jointly liable for failure to display lights as required.

The Eugene F. Moran, 212 U. S. 466; 53 L. Ed. 600.

POINT III

The Circuit Court of Appeals erred in failing to place upon the tug "Caspian" the burden of proving that the lack of a lookout did not contribute to the collision, and its decision is in conflict with those of other circuits.

As the Circuit Court of Appeals pointed out in its opinion, the "Mamei's" bridge is 312 feet aft of her stem, and there was no lookout on this flotilla forward of the "Mamei's" bridge. This Court has held, as strongly as words permit, that a lookout must be in the forward part of the vessel.

In *The Ottawa*, 70 U. S. 269-275, 3 Wall. 268, 18 L. Ed. 165, the Court held:

> "• • • Proper lookouts are competent persons other than the master and helmsman, properly stationed for that purpose, on the forward part of the vessel; and the pilot house in the night time, especially if it is very dark, and the view is obstructed, is not the proper place."
>
> *The Ogdensburg*, 62 U. S. 548, 21 How. 548, 16 L. Ed. 211.

So have the Circuit Courts of Appeal for various Circuits.

> *The Catalina* (CCA-9), 95 F. (2d) 283;
> *The Vedamore* (CCA-4), 137 F. 844;
> *The Hawaiian* (CCA-4), 124 F. (2d) 45;
> *U. S.* v. *Gould* (CCA-1), 73 F. (2d) 1016; affirming 55 F. (2d) 674;
> *The Choctaw* (CCA-6), 270 Fed. 114.

By its holding that petitioner "would have to show not only that there was an absence of proper lookouts, but also

that such a lack of lookouts contributed to the collision," the Court disregarded the cardinal rule in collision cases that the necessity for a lookout is so great the ship which fails to properly station one is deemed at fault unless she shows his absence could not have contributed to the collision.

In *The Ariadne,* 80 U. S. (13 Wall.) 475, this Court, speaking of a lookout's duty, and the requirement that a lookout be properly stationed, said:

> "It is the duty of all courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty, and the effect of nonperformance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."

Until this decision was rendered, the Circuit Courts have followed the directions of this Court in *The Ariadne, supra.*

The Madison, 250 Fed. 850, C. C. A. 2nd;
The Pilot Boy, 115 Fed. 873, C. C. A. 4th;
The City of Augusta, 80 Fed. 297, C. C. A. 1st.

CONCLUSION

The petitions should be granted.

Respectfully submitted,

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Attorney for Petitioner.